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Products Designed for Illegal Use—A Proposed Rule for Product Suppliers who Profit from Illegal Activity

George A. Nation, III*

Glen Smith gets into his car and, along with the normal activity associated with starting the automobile, flips an additional switch. He has just turned on his Protector radar detection device.¹ Mr. Smith merges onto the Pennsylvania Turnpike where the traffic is moderate; Mr. Smith, thanks to his radar detector, is confident there is no police radar ahead. One glance in the rear view mirror and he is convinced he can exceed the speed limit with no danger of being caught.² He accelerates to 80 miles per hour. Mr. Smith crests a slight rise in the road and encounters a vehicle in his lane that has slowed — he applies the brakes but cannot stop in time and slams into the back of the station wagon carrying a family of four.

One morning last October as officer Ben Jones of the New York Police Department left for work, Mrs. Jones kissed him goodbye. She worries every day, like every other spouse or family member of a police officer, about her husband and the dangers he faces on the job. She feels somewhat reassured since he began wearing the bullet proof vest she bought for him. Each morning as she kisses him good-

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1. A radar detector is a small device that alerts a driver to the presence of police radar by emitting a series of beeping sounds or flashing lights whenever police radar is detected. This in turn allows the speeding driver to slow down before he gets to the police radar, thereby avoiding any penalty for violating the speed limit. When the warning signal stops, the driver is assured that no radar is nearby and he can again exceed the speed limit. Since 1968 when radar detectors were invented, there has developed a \$275,000,000 per year market in radar detectors. Rogers, *Speed Bumps Ahead for Cincinnati Microwave*, FORTUNE, April 28, 1986 at 84 (quoting Seth Feinstein, an industry consultant). The market is still growing; one article noted that while radar detectors were "once an obscure gadget found mostly on the dashboards of high-performance cars or in the cabs of long haul trucks," they are now "becoming standard operating equipment on workaday Chevys, Fords and Toyotas." Castro, *Speeder's Friend, Smokey's Foe*, TIME, July 7, 1986 at 46. Castro notes that "1.5 million citizens bought so-called Smokey detectors last year, a 25 percent increase over 1984." *Id.* Radar detectors are legal in every state except Connecticut, Virginia and the District of Columbia. Moreover, the legality of statutes which bar radar detectors has been challenged based on the asserted right of free access to radar frequencies. *Id.*

2. Consumers buy radar detectors because the detectors allow them to exceed the legal speed limit with a greatly reduced risk of being caught. Arguably, if consumers did not have the detector they would be less likely to speed. *See infra* note 31.

bye, she feels for the vest to make sure he is wearing it. At 11:00 A.M. on that October day, Officer Jones responded to a call regarding a disturbance at an abandoned warehouse. As he entered the cocaine lab one of the occupants shot him — Officer Jones, hit in the chest, was later pronounced dead at the scene. When the lieutenant called Mrs. Jones, he explained, in response to her question, that there was nothing wrong with the vest; it was just no match for the Devestator bullets that had been fired at her husband. The lieutenant explained that such bullets are coated with a teflonlike material and as a result make conventional bullet proof vests worthless.

John Brown, the owner of a sporting goods store in a large city, discussed carrying a new line of handguns commonly known as "Saturday Night Specials"³ with the manufacturer's salesman. The salesman showed Mr. Brown their most popular model, a two and one half inch pistol, and said, "The suggested wholesale price, your cost, is \$21.80, the suggested retail price is \$30.50 so you can do pretty well on these." The salesman went on to say: "If your store is anywhere near a ghetto area these ought to sell real well. This is most assuredly a ghetto gun — it sells real well but, between you and me, its such a piece of crap, I'd be afraid to fire the thing or count on hitting anything that is more than four feet away."⁴ Mr. Brown decided to stock the handguns. The salesman was right; they sold very well.⁵

Joe White needed money, at least a few hundred dollars. He thought about robbing the 7-11 convenience store but wondered how he could do it and get away. If he had a gun, a pistol he could hide in his pocket, he felt sure he could get in, point the gun, demand the money, get it and get out without "anyone trying nothing."⁶ He

3. "Saturday Night Special" handguns are characterized as being small, easily concealable, inexpensive, inaccurate and poorly made. Thus, they are not useful for any legitimate purpose such as hunting, target shooting, law enforcement or self protection. The only use for Saturday Night Special handguns is illegal activity. *Kelley v. R.G. Indus.*, 304 Md. 124, 497 A.2d 1143 (1985).

4. These comments appear in the context of a hypothetical conversation. Substantially the same comments, however, were made by an actual salesman for the largest United States manufacturer of Saturday Night Special handguns. See Brill, *The Traffic (Legal and Illegal) in Guns*, HARPERS, Sept. 1977 at 37, 40.

5. It is very difficult to obtain accurate data concerning the production and sale of handguns. See Brill, *supra* note 4. A salesman for R.G. Industries, the largest manufacturer of Saturday Night Special handguns, is quoted as saying that 190,000 of just one model (RG fourteen) Saturday Night Special handgun were sold in 1976. *Id.* at 40.

6. Given a Saturday Night Specials' characteristics, it is easy to understand why it is the weapon of choice of criminals. Because of its small size, a Saturday Night Special is very easy to conceal. In addition, a Saturday Night Special is inexpensive and easy to dispose of. The metal used to construct Saturday Night Specials is often so soft that serial numbers are easily obliterated and ballistics characteristics change each time the gun is fired. No sportsmen

bought one of John Brown's Saturday Night Specials. Mr. White walked into the 7-11 and up to the cashier, pointed the gun and demanded the money in the cash register. At that moment someone walked in the store and Mr. White panicked, pointed the gun and at point blank range, pulled the trigger. He then turned and fired again. Max Thomas, the person entering the store, was pronounced dead at the scene and the employee at the cash register was rushed to the hospital.⁷

I. Introduction

In the reckless pursuit of money, certain product manufacturers are producing "criminal products," that is products that are designed to be used in illegal and often criminal activity.⁸ This term does not refer to products that have significant legitimate uses but which are occasionally used, or misused, in illegal activity.⁹ This article focuses exclusively on products whose objectively intended use is illegal activity.¹⁰ Saturday Night Special handguns, devastator

would use a Saturday Night Special because it is too inaccurate, but to a criminal robbing someone at point blank range, accuracy is not necessary. See *infra* notes 9-10 and accompanying text.

7. Every thirteen seconds a new handgun is sold in this country; every two and a half minutes the product injures someone and three times every hour it is an instrument of death. Turley and Harrison, *Strict Tort Liability of Handgun Suppliers*, 6 HAMLINE L. REV. 285, 285 (1983). See Note, *Manufacturers' Strict Liability for Injuries From a Well-Made Handgun*, 24 WM. & MARY L. REV. 467, 470 n. 17 (1983) (authored by Gerard Mackarevich) [hereinafter *Well-Made Handguns*]. See also Darts and Laurels, COLUM. JOURNALISM REV., Jan-Feb., 1982 at 22 (citing an investigative series in Cox Newspapers, Sept. 6-11, 1981) (giving statistical evidence of disproportionate criminal use of short-range, inaccurate handguns labeled "snubbies" because of their short barrels, such handguns are also referred to as "belly guns"). But see Brill, *supra* note 4, at 37 (arguing that the cheap handguns are not, in fact, used more often than more expensive handguns in crime).

8. Examples of products designed for use in criminal activity include: Saturday Night Special Handguns, see Kelley, 304 Md. at 145, 146, 794 A.2d at 153-54; Radar Detectors, see Rogers, *supra* note 1; and Devastator Bullets (bullets coated with a teflonlike material which enables them to penetrate conventional bullet proof vests). Because of their nature and design these products have no utility; they are only useful in illegal activity. See Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach*, 51 FORDHAM L. REV. 771, at 772, 790-91 (1983) (authored by H. Todd Iveson) [hereinafter *Common Law Approach*]; Turley and Harrison, *supra* note 7 at 285.

James Jaeger, chairman of Cincinnati Microwave, a leading producer of radar detectors, does "not deny that customers use his product to break the law." See Rogers, *supra* note 1 at 84. American Antenna of Elgin, Illinois, another producer of radar detectors, guarantees that customers using its K40 radar detector will not have to pay a speeding ticket. If one of its customers receives a speeding ticket resulting from police radar, American Antenna has promised to reimburse the owner for the amount of the ticket. See Castro, *supra* note 1 at 46.

9. Nor does this article discuss the liability of manufacturers or sellers of defective products. For an analysis of the similarities and differences between defective and criminal products, see *infra* notes 14-38 and accompanying text.

10. With respect to Saturday Night Special handguns, see Kelley, 304 Md. at 145-46, 497 A.2d at 1153-54 ("[T]hese characteristics [short barrels, light weight, easy concealability,

bullets, and police radar detectors are all examples of criminal products.¹¹ Current legal principles and theories are insufficient to deal effectively and efficiently with the growing incidents of preventable pain, injury, and destruction caused by these products.¹² The problem is that the present legal system has insulated criminal product manufacturers from bearing the cost of their products by effectively subsidizing the cost of production with human pain and suffering. This prevents the operation of free market forces with respect to criminal products.¹³ This Article proposes a solution to the criminal product problem and discusses its background, the application of the proposed solution, and the relevant policy considerations.

II. Proposed Solution

In order to solve the problem posed by criminal products there must be an expansion of the tort principles concerning the liability of product manufacturers.¹⁴ The subsidy of human pain and suffering that allows for the production of these products must be stopped. The manufacturers of criminal products must be required to bear the cost of their products. Only by allowing the people maimed and injured by criminal products to seek the relief they deserve will the market itself be freed — unfettered from the greed of an organized minority¹⁵ — to perform its supreme function of democratic resource

low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability] render the Saturday Night Special particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, protection of persons, property and businesses.”). *Id.* With respect to radar detectors, a major producer admits that customers use his product to break the law. *See* Rogers, *supra* note 1. Indeed, the author submits that there is no use other than illegal activity for which the product is suitable.

11. *See supra* note 8.

12. *See infra* notes 14-38 and accompanying text.

13. Until manufacturers of criminal products are required to bear the foreseeable cost of the harm resulting from the intended use of their products, the retail price of such products will be artificially low. As a result, consumers' decisions to purchase such products are based on incorrect information. The result is that the production of criminal products is being secretly subsidized by human pain and suffering. This prevents a demonstration of whether the production of criminal products is socially useful. If the product does not survive in the marketplace at the higher price (one that reflects the cost of harm caused by the product) then the conduct of producing criminal products is not socially useful. *See generally* W. PROSSER AND P. KEETON, *THE LAW OF TORTS* § 85 (5th ed. 1984).

14. Traditional products liability theories are not useful in solving the criminal product problem. *See infra* notes 15-38 and accompanying text.

15. An organized minority represented by organizations such as The National Rifle Association has been and will likely continue to be effective in preventing legislation which would deal effectively with Saturday Night Specials. One author has noted that “even assuming the existence of a consensus in favor of such legislation, opponents have proven to be effective in blocking passage by lobbying.” *Common Law Approach*, *supra* note 10, at n. 56. “No lobby is stronger than the gun lobby in its commitment to sacrifice 22,000 American lives a year for a ‘mythical’ right and illusory purpose.” Turley and Harrison, *supra* note 8, at 309. With respect

allocation.

To accomplish this end, the courts of this country should adopt a new rule of law. This rule would, in effect, be a companion to section 402A of the Restatement (Second) of Torts.¹⁶ The following is a suggested prototype of such a rule:

1. One who sells any product that is likely to be principally used in illegal activity and which has an insignificant legitimate use in today's society is subject to liability for physical harm caused by such product or by a third party's use of such product to any person or to his property if:

(a) the seller is engaged in the business of selling such a product;

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold;

(c) the injury occurs at a time when the product is being use in illegal activity; and

(d) the person injured was not a participant in the illegal activity.

2. The rule stated in subsection (1) applies although:

(a) the seller has exercised all possible care in the preparation and sale of his product;

(b) the person injured has not bought the product from or entered into any contractual relation with the seller; and

(c) the product has been manufactured in accordance with design specifications and has not malfunctioned.

III. Background

Courts have been faced with the problem of criminal products for sometime.¹⁷ With the exception of the *Kelley*¹⁸ case, however,

to radar detectors, they are illegal in only Connecticut, Virginia, and the District of Columbia. Rogers, *supra* note 1.

16. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Courts are not only the proper institution to adopt the proposed rule, they are the only institution that is likely to do so. See *supra* note 15 and accompanying text. The goal of the imposition of tort liability upon criminal product manufacturers is to compensate those injured by the products and to allow the proper functioning of the free market; it is not to directly prohibit the production of such products by governmental fiat. See *infra* notes 79-80 and accompanying text.

17. Most cases have concerned Saturday Night Specials. See, e.g., *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984), *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985) (rejected defective design claim), *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107 (D. Mass. 1983); *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983); *Riordan v. International Armament Corp.*, 132 Ill. App.3d 642, 477 N.E.2d 1293

courts have not effectively dealt with the problem.¹⁹ With the exception of the rule adopted in *Kelley*,²⁰ none of the recognized principles of strict liability of product manufacturers can be properly applied to hold the manufacturers or marketers of criminal products liable to a person injured by the use of such products in illegal activity.²¹ The principles of tort law relating to the liability of product manufacturers are inadequate to deal with the criminal products problem.

There is a fundamental difference between the problem posed by criminal products and the problem associated with products to which a section 402A type of analysis applies. Section 402A is designed to protect consumers or users of products from injury due to malfunctioning products.²² Manufacturers of criminal products, however, should incur liability not because their products malfunction but rather, because of their products *function*.²³ This difference,

(1985) (no liability where product operated precisely as designed); *Brady v. Hinckley*, No. 82-0549 (D.D.C. Sept. 8, 1982).

18. *Kelley*, 304 Md. 124, 497 A.2d 1143.

19. As one commentator noted: "[N]o court to date has determined that the likelihood of criminal handgun misuse resulting from a manufacturer's unreasonable product design and marketing may, in some circumstances, provide a basis in negligence and strict products liability for finding a breach of its common-law duty to provide reasonably safe products." *Common Law Approach*, *supra* note 8, at 773.

20. For a discussion of the rule, see *infra* notes 45-60 and accompanying text.

21. See *Kelley*, 304 Md. at 132, 497 A.2d at 1146 ("For the following reasons, however, neither of these two doctrines, [strict liability in tort and strict product liability under section 402A] nor any of the other previously recognized strict liability principles, could properly be applied to hold, in general, the manufacturer or marketer of a handgun liable to a person injured by the handgun during the course of a crime."). *Id.*

22. RESTATEMENT (SECOND) OF TORTS § 402A (1965) requires that the product be in a "defective condition unreasonably dangerous to the user or consumer" In order to fulfill the requirement of a defective condition, it has generally been required that there be something wrong with the product or that it has in some way malfunctioned. "For the handgun to be defective, there would have to be a problem in its manufacture or design, such as a weak or improperly placed part, that would cause it to fire unexpectedly or otherwise malfunction." *Kelley*, 304 Md. at 136, 497 A.2d at 1148. "Therefore, the risk-utility test cannot be extended to impose liability on the maker or marketer of a handgun which has not malfunctioned." *Id.* 304 Md. at 138, 497 A.2d at 149. "[The] size and concealability of the defendant's handguns were not conditions which caused the handgun to fail to perform in the manner reasonably to be expected in light of its nature and intended function." *Riordan v. International Armament Corp.*, 132 Ill. App.3d 642, 477 N.E.2d 1293 at 1298 (1985); "[I]n most jurisdictions, a well-made handgun cannot form the basis for a strict liability claim because the weapon does not contain dangers unanticipated by the ordinary consumer." *Well-Made Handgun*, *supra* note 7 at 481; "[P]roducts liability doctrine seems to demand, as a threshold matter, that there be 'something wrong' with a product before risk-utility analysis may be applied." Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1915 [hereinafter *Handguns*].

23. The risk of injury from criminal products is not to the user or consumer of the product, rather it is to the general public. Moreover, this risk of danger results from the intended use (illegal use) of the product and the *proper functioning* of the product during such use. For example, the risk of injury from a Saturday Night Special is borne by the store clerk or other member of the public that is the victim of the crime, not the criminal user himself, and that risk results from the product's intended use (illegal use) and proper functioning, as in discharging a bullet with deadly force in the direction in which the gun is aimed when the

has rendered section 402A useless in dealing with the problem caused by criminal products.²⁴ Under current product liability analysis, a plaintiff cannot hold a manufacturer liable for injuries caused by a product unless the plaintiff can show that the product is defective.²⁵ Because criminal products are not defective, as such term is defined in product liability analysis, manufacturers are not presently liable under a section 402A type of analysis.

Commentators and courts have recognized three types of defects that may make a product defective under section 402A; manufacturing, design, and defects resulting from the manufacturer's failure to give adequate warning.²⁶ The only type of defect that is relevant with respect to criminal products is a design defect.²⁷ The allegation is not that the individual product involved was produced or manufactured incorrectly; rather, the allegation is that the design itself is defective.²⁸ There are two generally accepted tests used to determine if a product was designed defectively; the consumer expectations test and the risk utility test.²⁹ Neither of these tests, however, has proven effective with respect to criminal products.³⁰

trigger is pulled. See *infra* notes 35-36 and accompanying text.

24. See *infra* notes 25-38 and accompanying text.

25. See *Kelley*, 304 Md. at 135, 497 A.2d at 148; See also RESTATEMENT (SECOND) OF TORTS § 402A (1) comment g (1965); W. PROSSER, LAW OF TORTS § 98 (1971); W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 1, at 2 (1979); Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325, (1971); See generally Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

26. See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 3.03[2] (1986); Wade, *A Conspectus of Manufacturers' Liability for Products*, 10 IND. L. REV. 755, 756-57 (1977); W. PROSSER AND P. KEETON, *supra* note 13, § 99, at 695.

27. See *Common Law Approach*, *supra* note 8, at 790; *Handguns*, *supra* note 22, at 1912-13. *Well-Made Handgun*, *supra* note 7, at 482.

28. See W. PROSSER AND P. KEETON *supra* note 13 § 99, at 694, 698; see, e.g., *Self v. General Motors Corp.*, 42 Cal. App. 3d 1, 6, 116 Cal. Rptr. 575, 578 (1974). *Self* involved a Ford Pinto automobile that was found to be defective due to the design which placed its gasoline tank near the rear bumper. The court held that the placement of the tank in the center of the car would have reduced the chances of fire in rear-end collisions without creating other risks, significantly reducing performance, or significantly increasing costs. Thus, under the risk-utility test the design was defective because the risk associated with the placement of the gasoline tank in the rear outweighed its utility. *Id.*

29. See generally Traynor, *supra* note 27, at 363, 370; Wade, *On the Nature of Strict Liability for Products*, 44 Miss. L. J. 825, 837-38 (1973). Professor Wade suggests seven factors to be examined in applying the risk-utility test: 1) utility of the product; 2) likelihood and seriousness of potential injury; 3) availability of a substitute; 4) ability to eliminate the unsafe character of the product without undue expense or destroying the product's usefulness; 5) user's ability to avoid danger; 6) user's anticipated awareness of danger; and 7) feasibility of the manufacturer spreading the risk of loss. See also L. FRUMER AND M. FRIEDMAN, *supra* note 26; W. PROSSER AND P. KEETON, *supra* note 13 § 99, at 694, 698-702.

30. See *Kelley*, 304 Md. at 138, 497 A.2d at 149. In *Kelley*, the court stated: "In sum, regardless of the standard used [consumer expectation or risk-utility] to determine whether a product is 'defective' under Sec. 402A, a handgun which functions as intended and as expected is not 'defective' within the meaning of that section. This has been the consistent conclusion in

Criminal products will not be considered defective under the consumer expectations test because consumers expect such products to be useful in dangerous illegal activity.³¹ Products are considered defective under the consumer expectations test if the product, at the time it leaves the seller's hands, is in a condition not contemplated by the ultimate consumer which will render the product unreasonably dangerous to him.³² The consumer of criminal products expects them to be useful in dangerous illegal activity. Indeed, the typical consumer of such a product is purchasing the product precisely because it is useful in illegal activity.³³ Consumer expectations analysis is focused on the ultimate user or consumer³⁴ and will not permit the focus of the inquiry to shift to the general public.³⁵ In the case of

other jurisdictions which have confronted the issue." See, e.g., *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200, 1203-04 (7th Cir. 1984); *Patterson v. Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985); *Richman v. Charter Arms Co.*, 571 F. Supp. 192 (E.D. La. 1983), *rev'd on other grounds; sub nom.* *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1268 (5th Cir. 1985); *Riordan v. International Armament Corp.*, 132 Ill. App.3d 642, 477 N.E.2d 1293 (1985); *Francis v. Diamond International Corp.* Nos. CV 82-11-1279 and CV 83-02-0215 (Ct. of Com. Pl., Butler County, Ohio, March 22, 1983), *appeal noted*, No. CA-84-09-111, Ohio App. See also *Well-Made Handgun*, *supra* note 7; *Santavelli and Calio, Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L. J. 471 (1983); *Handguns*, *supra* note 25. But see *Turley and Harrison*, *supra* note 2; *Common Law Approach*, *supra* note 8.

31. It is ridiculous to ask whether the purchaser of a radar detector is aware that the product may increase his likelihood of speeding and thereby present a danger to the general public. Obviously, if the purchaser felt comfortable speeding without the assistance of the detector, or if he did not want to speed, he would not purchase the detector. He purchases the radar detector so that he can speed with a reduced risk of being apprehended through the use of police radar.

32. See RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965).

33. For example, the purchaser of a Saturday Night Special handgun is obviously aware of the risk associated with the gun's use in illegal activity. Indeed, the intention to use the Saturday Night Special in illegal activity is the only logical reason for him to purchase the handgun.

34. Even though the drafters of the Restatement expressed no opinion as to section 402A's applicability to bystanders, some courts have found section 402A to be applicable to bystanders. See generally, *Common Law Approach*, *supra* note 10 at n. 61 and cases cited therein. None of the bystander cases, however, arose under a "criminal product" theory. Bystander cases are fundamentally similar to other section 402A cases in that they are concerned with injury to the user, consumer and, in the case of bystanders, those nearby. But this is merely a recognition of the fact that a defective product's scope of injury can extend beyond the user. This is not the same as recognizing a risk to the public that is different than the risk to the user or consumer. Thus, such cases are not helpful in dealing with criminal products that encourage illegal activity and thereby present a risk of injury to the public. See *infra* notes 35-38 and accompanying text.

35. Products that fail to function as intended present a risk of injury to the public in that any member of the public is a potential user or consumer (or perhaps a bystander in a situation where the scope of the injury spreads beyond the user or consumer). Thus, by allowing users and consumers to recover, the public is protected from the risk associated with defective products. See *supra* notes 22-34 and accompanying text. Criminal products, however, pose a risk of injury to the public as opposed to the user or consumer. Those at risk include everyone *other than* the user or consumer. Thus, a rule that protects injured users or consumers is not adequate to protect the public from the risk associated with criminal products.

criminal products, however, it is the public, not the consumer, which bears the risk of injury created by the products.³⁶

Nor will criminal products be found to be defective under the risk utility test.³⁷ Many courts have held that the risk utility test can only be applied when something goes wrong with the product, as when the product malfunctions.³⁸ For example, many courts will not consider applying the risk utility test until a threshold requirement that "there is something wrong with the product" has been met.³⁹ In other words, in order for the risk-utility test to be applied, the plaintiff must show that the product failed to perform in the reasonably expected manner.⁴⁰ Thus, unless the product has malfunctioned, the test is inapplicable. Criminal products, when used in illegal activity,

36. If one were to logically apply section 402A to criminal products, the inquiry would have to be: Are criminal products in a condition unexpected by the *public* which makes them more dangerous to the *public* than the *public* expects? Even focused in this way, criminal products still would not be deemed defective unless the analysis were changed. That is, expectations under a section 402A analysis are met if the product functions as expected. Such an inquiry with respect to criminal products is irrelevant. The relevant analysis for criminal products focuses on expectations concerning *use*, not function. The problem with criminal products is not their function, it is that they are designed to function in the context of illegal activity. Any firearm propels a bullet with deadly force; that does not make it a criminal product. It becomes a criminal product when it is designed so that its primary *use* is for illegal activity. See *supra* notes 8-10 and accompanying text. If the analysis under section 402A could be changed in this way, then it becomes obvious that such products would be defective. The public does not expect, for example, a type of handgun to be designed so that its primary use is for illegal activity. In short, the public does not expect any product to be designed so that its primary use is in illegal activity. Nor does the public expect businessmen to profit from products that they know are used principally in crime. There is no merit in running a business well if the product produced is of no use to, and indeed harms, society.

Section 402A is capable of effectively protecting consumers and users from defective products but it can not be extended, nor should it be extended, to deal with criminal products. The problems posed by the two types of products are fundamentally different. See *supra* notes 22-35 and accompanying text. If section 402A was stretched to apply to criminal products, inconsistencies would develop that could threaten not only section 402A's effective use for criminal products but its use for defective products as well.

37. Under the risk utility test, a product is defective if on balance the benefits of the challenged design do not outweigh the risk of danger inherent in such design. See *Barker v. Lull Engineering Co., Inc.*, 20 Cal.3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

38. See *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985). In *Patterson*, plaintiff's decedent died from gunshot wounds inflicted by a .38 caliber Rohm during the commission of a crime. The plaintiff argued that the gun's manufacturer was strictly liable under section 402A. Rejecting the "defective design" claim, the court stated that "a gun, by its very nature, must be dangerous and must have the capacity to discharge a bullet with deadly force." *Id.* at 1212. See, e.g., *Riordan v. International Armament Corp.*, 132 Ill. App.3d at 650, 477 N.E.2d at 1298. In *Riordan*, the court rejected the plaintiff's contention that a handgun was defectively designed because it was small and easily concealable. The court stated: "[The] size and concealability of the defendants' handguns were not conditions which caused the handgun to fail to perform in the manner reasonably to be expected in light of its nature and intended function." *Id.* The court held that a handgun could not be deemed to be defective "where the plaintiff's injury was caused by that product's operation precisely as it was designed to operate." *Id.* See also *Handguns*, *supra* note 27, at 1915-17 and nn. 19-26.

39. See *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1211 (N.D. Tex. 1985).

40. *Id.*

are not malfunctioning; instead they are functioning precisely as intended and expected.⁴¹ This illustrates the fundamental difference between the problem posed by criminal products and that posed by products to which traditional product liability analysis applies. In the later case, the manufacturer of such a product is liable for the malfunctioning of his products, while in the former, the manufacturer should be liable because of the product's function. Thus, criminal products are not defective under either the consumer expectations test or the risk utility test. This is the reason that traditional strict products liability analysis has not and will not be effective in solving the problem created by criminal products.

A Saturday Night Special handgun, an example of one of the most destructive criminal products, was the focal point of *Kelley v. R.G. Industries*.⁴² In *Kelley*, the plaintiff, Olen J. Kelley, was shot in

41. See *Kelley*, 304 Md. at 138, 497 A.2d at 1149; Castro, *supra* note 1 ("Many of the motorists [taking trips in summer 86] are bound to indulge in a familiar American Pastime: avoiding speed traps Indeed, U.S. drivers in ever increasing numbers are turning for help in that unsporting effort to one of the hottest of automobile accessories, the miniature radar detector.") The chairman of a major producer of radar detectors admits that customers use his product to break the law. Rogers, *supra* note 1.

42. See *Kelley v. R.G. Indus.*, 304 Md. 124, 497 A.2d 1143 (1985). Procedurally, *Kelley* began in the circuit court for Montgomery County, Maryland. One of the defendants, R.G. Industries, had the case removed to the United States District Court for the District of Maryland pursuant to 28 U.S.C. sections 1441 and 1446. A motion was made to have the case dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court found that there were no controlling precedents in the Maryland Court of Appeals and certified certain questions to the Maryland Court of Appeals. During oral argument, matters were raised that were not specifically addressed in the certification order. The plaintiffs requested that the order be withdrawn and that a new order be filed. Pursuant to the request, the district court withdrew the original order and substituted a "Further Order of Certification" containing the following questions:

Question 1

Is a handgun, which inflicts injury as the norm, rather than the exception, a defective or unreasonably dangerous product?

If the answer to Question 1 is "No," then

Question 2

Is a Rohm Revolver Handgun Model RG38S, which inflicts injury as the norm, rather than the exception, a defective or unreasonably dangerous product?

Question 3

Is the marketing of handguns an abnormally dangerous activity? In answering this question, it may be that the Court of Appeals of Maryland may desire to address itself to the following sub-questions:

(a) Does the abnormally dangerous activity doctrine extend to instances in which the alleged tortfeasor is not an occupier of land?

(b) Does the abnormally dangerous activity doctrine apply where harm is brought about by some third person or persons over whom the tortfeasor had no control?

If the answer to Question 3 is "No," then

Question 4

Is the marketing of Rohm Revolver Handguns Model RG38S an abnormally dangerous activity? In answering this question, it may be that the Court of Appeals of Maryland may desire to address itself to the following

the chest during an armed robbery of the grocery store where he was employed.⁴³ The gun used in the crime was a Rohm Revolver Handgun Model RG-38S designed and marketed by Rohm Gesellschaft, a West German corporation.⁴⁴

The court in *Kelley* found, inter alia, that "regardless of the standard used to determine whether a product is 'defective' under section 402A, a handgun which functions as intended and as expected is not 'defective' within the meaning of that section."⁴⁵ The court went on to note that "this has been the consistent conclusion in other jurisdictions which have confronted the issue."⁴⁶

The court recognized, however, that the problem of criminal products must be solved and, moreover, that the courts have the power, indeed the duty, to solve the problem.⁴⁷ The court stated that the fact that heretofore a handgun's classification as a Saturday Night Special did not necessarily bring its manufacturer or marketer

subquestions:

(a) Does the abnormally dangerous activity doctrine extend to instances in which the alleged tortfeasor is not an occupier of land?

(b) Does the abnormally dangerous activity doctrine apply where harm is brought about by some third person or persons over whom the tortfeasor had no control?

304 Md. at 29-31, 497 A.2d at 1145-46. The court noted that the *Further Order of Certification* provided that the court was not restricted in its consideration and determination of the matter by the phrasing of the certified question. The court rephrased the questions as follows:

1) Is the manufacturer or marketer of a handgun, in general, liable under any strict liability theory to a person injured as a result of the criminal use of its product?

2) Is the manufacturer or marketer of a particular category of small, cheap handguns, sometimes referred to as "Saturday Night Specials," and regularly used in criminal activity, strictly liable to a person injured by such handgun during the course of a crime?

3) Does the Rohm Revolver Handgun Model RG38S, serial number 0152662, fall within the category referred to in question 2?

Id.

43. See *Kelley*, 304 Md. at 128, 497 A.2d at 1144.

44. *Id.*

45. *Id.* at 138, 497 A.2d at 1149. See *supra* notes 14-38 and accompanying text.

46. *Id.*

47. In *Kelley* the court stated:

. . . [T]he common law is not static; its life and heart is its dynamism — its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems The common law is, therefore, subject to judicial modification in light of modern circumstances or increased knowledge. Indeed, we have not hesitated to change the common law to permit new actions or remedies where we have concluded that such course was justified It is entirely consistent with public policy to hold the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products Furthermore, in light of the ever growing number of deaths and injuries due to such handguns being used in criminal activity, the imposition of such liability is warranted by today's circumstances.

Id. at 140, 497 A.2d at 1150-51 (footnotes omitted).

within any of the previously existing theories of strict liability was not dispositive of the case.⁴⁸ Noting that the common law adapts to fit the needs of society,⁴⁹ the court held the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons not involved in the crime who suffer gunshot injuries from the criminal use of such products.⁵⁰

In reaching this conclusion, the court referred to the fact that Congress as well as the Maryland General Assembly had enacted a comprehensive regulatory scheme concerning the wearing, carrying and transporting of handguns.⁵¹ The court found, however, that Saturday Night Specials clearly are not sanctioned as a matter of state or federal public policy.⁵² While no clear cut definition of a Saturday Night Special exists the court noted these guns are generally characterized by: short barrels, light weight, easy concealability, low cost, use of low quality materials, poor manufacture, inaccuracy and unreliability.⁵³ The court stated that such characteristics render the Saturday Night Special particularly attractive for criminal use and virtually useless for any legitimate purpose.⁵⁴ In addition, the court found that "the manufacturers or marketers of a Saturday Night Special know or ought to know that they are making or selling a product principally to be used in criminal activity."⁵⁵ The court also noted that "as between the manufacturer or marketer of a Saturday Night Special, who places among the public a product that will be used chiefly in criminal activity, and the innocent victim of such misuse, the former is certainly more at fault than the latter."⁵⁶

The manufacturer or marketer of criminal products knows, or should know, that his product will be used in illegal activity.⁵⁷ Illegal activity is objectively the intended use of the product.⁵⁸ The law should no longer permit the manufacturer or marketer to shut his eyes to the obvious, to hide behind his profit and loss statement with the claim — "I just make or sell the product; I do not tell the buyer what to do with it." When illegal use and harm is virtually all that can be foreseen or expected from the product's intended use, the

48. See *Kelley*, 304 Md. at 140-41, 497 A.2d at 1150-52.

49. *Id.*

50. *Id.* at 159, 497 A.2d at 1160.

51. *Id.* at 142-57, nn. 5-17, 497 A.2d at 1151-58.

52. *Id.*

53. *Id.* at 144-46, 497 A.2d at 1153-54.

54. *Id.* at 146, 497 A.2d at 1154.

55. *Id.* at 155, 497 A.2d at 1158.

56. *Id.*

57. *Id.*

58. *Id.*

manufacturer and marketer must be made liable for that harm when in fact it occurs.

The holding of the *Kelley* case is limited to Saturday Night Specials⁵⁹ but its logic is applicable to the entire class of criminal products. The holding of *Kelley* needs to be restated in general terms and adopted by courts across the country.⁶⁰ The adoption of a rule similar to the one proposed will allow the great light of justice to shine upon the mercenary manufacturers and marketers of criminal products and reveal the responsibility they bear for the preventable pain and suffering foreseeably caused by their products.

IV. Application of the Proposed Rule

The proposed rule and section 402A are similar in a number of ways. Both rules impose strict liability and focus directly on the product rather than the manufacturer or marketer. Moreover, both serve the same basic purpose of protecting the public from dangerous products. As mentioned above, however, the risk of danger and its relation to the product is fundamentally different with respect to criminal products than for products to which section 402A can be applied.⁶¹ This fundamental difference is illustrated by the fact that the proposed rule only applies to products that are "likely to be principally used in illegal activity and which have an insignificant legitimate use in today's society."⁶² The requirement of "principal use" may be established by statistics referring to the actual use of the product,⁶³ or the "likely principal use" may be inferred from the characteristics of the product.⁶⁴ The phrase "illegal activity" is used to include not only activity that is criminal but also any activity that violates the law. The seriousness of the illegal use as determined by the potential for and severity of the injuries likely to result from it, however, should affect the analysis.⁶⁵ In order for the rule to apply to a product, such product must have an insignificant "legitimate use in

59. See *id.* at 159, 497 A.2d at 1160.

60. See *supra* notes 16-19 and accompanying text.

61. See *supra* notes 22-38 and accompanying text.

62. See *supra* notes 16-18 and accompanying text.

63. See *e.g.*, *Kelley*, 304 Md. at 145, 497 A.2d at 1153. "Support is also found in statistical studies of handguns used in crime confiscated by police in major urban centers. One such study showed that 69 percent of handguns used in homicides, and 75 percent of handguns seized that were used in assaults were the small 'crime-related handgun' with barrel lengths of less than three inches." *Id.* (citations omitted).

64. A product's physical characteristics may imply its intended usage. See *e.g.*, *supra* note 12.

65. All things being equal, the more severe the likely injury from the product's illegal use, the more likely the product is to be characterized as a criminal product.

today's society."⁶⁶ The existence of *any* legitimate use for the product will not prevent the application of the rule. Moreover, the significance of a legitimate use would depend both upon whether such use is actually made of the product as opposed to merely a possible use,⁶⁷ and whether substitute products are available with respect to the legitimate uses of the alleged criminal product. It is also relevant whether the features that allow for the legitimate use can be retained if those that make it a criminal product are removed. If so, then the rule should apply to the product. In addition the reference to "today's society" is intended to allow the rule to keep pace with a changing society.

The cause requirement of the proposed rule is similar to section 402A's cause requirement. That is, cause-in-fact and proximate cause will both be elements of the cause of action. Proximate cause, however, should rarely be in question once the product is found to be a criminal product because foreseeability on the part of the product seller can be inferred once the product is so characterized.⁶⁸ The issue of intervening, supervening cause based on a third party's illegal use of the product should likewise rarely create an issue because the proposed rule specifically subjects the product seller to liability for injuries resulting from a third party's illegal use of the product. This provision is made in the rule to avoid possible confusion, but it merely reflects current law.⁶⁹ It has long been established that foreseeable intervening forces will not supersede defendant's responsibility, where the defendant's conduct has increased the risk of harm from the intervening cause.⁷⁰ For example, the sale of a radar detec-

66. See *supra* notes 16-17 and accompanying text.

67. For example, if the producers of radar detectors were to argue that their products are designed for use by individuals desiring to ensure they are not being followed by someone using radar, such argument would be insufficient, in light of the product's actual use, to prevent the product's classification as a criminal product.

68. Before the proposed rule will be applied to a specific product, it requires that the product "is likely to be principally used in illegal activity" and have "an insignificant legitimate use in today's society." See *supra* notes 16-18 and accompanying text.

69. THE RESTATEMENT (SECOND) OF TORTS states:

The act of a third person in committing an intentional tort is a superseding cause of harm to another resulting therefrom although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless* the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS § 448 (1965) (emphasis added). Although section 448 reflects legal principles applicable to those whose conduct indicates negligence, the author believes such principles, as they relate to causation, can be properly applied in the products liability and criminal product context. See *generally* W. PROSSER, *supra* note 25, § 44.

70. W. PROSSER, *supra* note 25, § 44, 272-73.

tor increases the likelihood that purchasers of the product will exceed the speed limit. Thus, because the intervening cause — the consumers decision to exceed the speed limit — is foreseeable to the product seller and the sale of the product increases the risk of speeding, such intervening cause will not be characterized as a superseding intervening cause.⁷¹

The cause-in-fact requirement will usually present a question for the jury.⁷² The argument to establish cause-in-fact is simply that, but for the existence of the product, the injury actually suffered would not have occurred as it did.⁷³

Like section 402A, the proposed rule only applies to sellers engaged in the business of selling such products, and it does not apply to sellers who sold the product prior to a change being made in the product by a subsequent seller.⁷⁴ Changes made by the consumer, however, would not allow sellers to use the protection provided by this provision. In order to be consistent with respect to the problem presented by criminal products, the rule does not apply unless the product is being used in illegal activity.⁷⁵ Moreover, the rule will not apply in cases where the plaintiff was a participant in the illegal activity.⁷⁶ As in section 402A, privity of contract between plaintiff and defendant is not required by the proposed rule.⁷⁷ In addition, because of the nature of the problem associated with criminal products, it is specifically provided that the fact that the product was manufactured in accordance with design specifications and has not malfunctioned will not prevent liability under the proposed rule.⁷⁸ The problem with criminal products is not that they malfunction —

71. See *supra* note 69 and accompanying text.

72. See W. PROSSER, *supra* note 25 § 41, at 236.

73. *Id.*; See also *Handguns*, *supra* note 24, at 1919 n.39.

Under the less stringent cause-in-fact standard, however, the plaintiff would be able to recover despite the possibility that the person who injured him could have carried out the crime even if the handgun manufactured by the defendant had not been available. The argument for causation would be simply that, but for the existence of the handgun and its capacity to cause harm, the injury actually suffered by the plaintiff would not have occurred as it did.

Obviously, in appropriate circumstances one could rely on the significant factor test as well as the rest of the law of causation as it has developed with respect to negligence and strict products liability. *Id.*

74. See *supra* text accompanying notes 16-17.

75. *Id.*

76. *Id.* This is in recognition of the type of risk created by criminal products. See *infra* notes 22-38 and accompanying text.

77. See *supra* text accompanying notes 16-17.

78. *Id.* This is in recognition of the fact that the problem associated with criminal products is not that they malfunction — it is precisely that they *function* as designed and that they are designed for illegal use. See *supra* notes 22-38 and accompanying text.

it is that they function precisely as designed.

V. Policy Considerations

One may argue that under our economic system, the free market should determine what products will be produced and that the proposed rule in effect dictates that certain products will not be produced. The proposed rule, however, does not directly ban any product.⁷⁹ Rather, it requires that the foreseeable cost to society that is associated with criminal products be borne by those who are responsible for and profit from the illegal use of such products. If the products are no longer produced after the rule is adopted then it is simply because society has decided that the price of such products, when such price has been brought to their attention, is too high when compared with the utility of the product.⁸⁰ In that case, the use of resources to produce such products is improper.

In addition, it may be argued that courts should refrain from adopting the rule called for by this author; this argument would advocate that such a rule must be adopted by the legislature. Section 402A, however, was adopted by the courts, *not* the legislature.⁸¹ Fundamentally, courts must serve justice. Most often courts achieve this goal by applying law. When justice demands, however, the courts have and must continue to heed the call and formulate the rules necessary for a just society.⁸² The mere fact that liability has not heretofore been recognized has not and should not stop its recognition when such recognition is demanded by the principles of justice.⁸³

The blatant injustice associated with criminal products is clear. In essence the product manufacturer and seller are accomplices to the illegal activity for which their products are used. Clearly, the manufacturer and marketer knowingly aid the commission of the illegal act.⁸⁴ Their fault should not go unrecognized merely because

79. Prosser and Keeton, *supra* note 13 § 85, at 610; *See Common Law Approach, supra* note 8, at 799.

80. *See supra* note 79.

81. *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

82. *See Kelley*, 304 Md. at 140-42, 794 A.2d at 1150-51. *See e.g.*, *Greeman v. Yuba Power Prod., Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

83. *See supra* note 47 and accompanying text.

84. The manufacturers and sellers of criminal products know that their products will be used primarily in criminal activity, yet they continue to produce and sell them. *See Kelley*, 304 Md. at 137, 497 A.2d at 1158. ("Saturday Night Specials are largely unfit for any of the

they did not actually carry out the illegal act. The law does not allow so inconsequent a distinction. The concept of vicarious liability is applied throughout the law to deal with such situations.⁸⁵ The fault of the perpetrator is not to be excused by the fault of the manufacturer or seller. Rather, they are *all* at fault, although the perpetrator's degree of fault is much greater than the product manufacturer or seller. Thus, the manufacturer and seller of criminal products should bear civil responsibility for the foreseeable and preventable harm which their criminal products cause.⁸⁶

It is often said that fairness requires that one who is made to pay for the harm suffered by another should in some way be at fault with respect to the occurrence of the harm.⁸⁷ The concept of fault, however, has continued to evolve and is no longer limited to a concept of personal moral blame.⁸⁸ As Dean Prosser notes: "in the legal sense, 'fault' has come to mean no more than a departure from the conduct required of a man by society for the protection of others, and it is the public and social interest which determines what is required."⁸⁹ Thus, for example, even though section 402A provides for strict liability, this is more a matter of proof than the imposition of liability without fault.⁹⁰ As discussed earlier, 402A requires that the product be defective before liability is imposed.⁹¹ Under section 402A, there is no requirement that the plaintiff prove that the defendant was negligent with respect to the injuries suffered by the plaintiff but the fact that such fault need not be proved does not mean that it does not exist. Someone other than the consumer designs and produces the product and products do not become defective

recognized legitimate uses . . . the chief value a Saturday Night Special Handgun has is in criminal activity . . .") *Id.* With respect to radar detectors the Chairman of a leading manufacturer of the devices, when questioned about the use of his product to break the law stated "Everybody knows why people buy radar detectors . . ." Indeed, as with other criminal products, I submit there is no use for radar detectors other than to break the law. *See also supra* notes 1-3 and accompanying text.

85. *See* W. PROSSER AND W. KEETON, *supra* note 13 § 69, at 499. The policy arguments stated by Prosser and Keeton in support of strict liability — accident prevention, enterprise risk-shifting capacity, and difficulties of proving negligence — are applicable with respect to criminal products.

86. *See infra* notes 8-16 and accompanying text.

87. *See* W. PROSSER, *supra* note 25, § 4, 17-18, n.32.

88. *Id.* at 18.

89. *Id.*

90. *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. LAW REV. 791 (1966), at 840-48 "When the plaintiff has proved this much, [referring to the elements that the plaintiff must establish under Section 402A] all trial lawyers know that he usually recovers in a negligence action against the manufacturer . . . The alarm of the manufacturers over the prospect of a great increase in liability under the new rule [402A] is not in reality justified." *Id.* (footnotes omitted).

91. *See supra* notes 22-30 and accompanying text.

on their own.⁹²

Similarly, with respect to criminal products, liability is not imposed without fault; rather, like section 402A, *proof* of fault is not required. As in a section 402A analysis, the focus is on the product, not the manufacturer.⁹³ Moreover, once a product has been classified as a criminal product, the inference of fault on the part of the sellers of the product with respect to injuries caused by the product's use in illegal activity reasonably follows.⁹⁴

Another important policy consideration, perhaps the most important, is public safety and the right of individuals injured by criminal products to recover for their injuries. In our society, tort law has been the principal champion of public safety.⁹⁵ The United States tort system developed over hundreds of years and countless decisions. It has been the main avenue available to victims in their quest for compensatory justice. The tort system has allowed our country to stand without equal in its civilized recognition of the individual's right to safety — in the workplace, the environment, and with respect to products.⁹⁶ It has provided for the generation of the deterrence consequences that result from a successful settlement award or appellate decision, and it provides an incentive to manufacturers and sellers to engage in safer and more healthful practice in the future.⁹⁷ Everyone has benefitted from the deterrence function served by tort law even if they are fortunate enough to have never been injured by, for example, an unsafe product. The products used everyday are safer because of the lawsuits, appellate court opinions and judgments of the past.⁹⁸ Tort laws and principles have been the driving force in this society's steady course from a shameless disregard of individual physical integrity toward respect for human dignity, and a recognition that human safety cannot be sacrificed for profit.⁹⁹ Thus, it is

92. See *supra* note 90. One reason negligence need not be proved is because today's products and marketing structure make it too difficult to prove. Once it has been established that the product is defective, however, the inference of negligence or fault can reasonably be made. *Id.* See generally *Kelley*, 304 Md. 124, 497 A.2d 1143. W. PROSSER AND P. KEETON, *supra* note 13, § 98, at 693.

93. See *supra* text accompanying notes 16-17.

94. See *supra* note 90.

95. From a transcript of remarks of Ralph Nadar made at the Philadelphia Bar Association Quarterly Meeting and Luncheon, June 18, 1986, Philadelphia Centre Hotel, Philadelphia, Pennsylvania, page 5 (a copy of the transcript is available from the Philadelphia Bar Association, One Reading Center, Philadelphia, PA 19107 (215) 238-6300) (hereinafter "Remarks of Ralph Nadar").

96. *Id.* at 16.

97. *Id.* at 4; see generally PROSSER AND KEETON, *supra* note 15, § 98, at 692-93.

98. See W. PROSSER AND P. KEETON, *supra* note 13, § 98, at 693.

99. See Remarks of Ralph Nadar, *supra* note 95, at 5.

appropriate to look to tort law to provide protection from criminal products. The proposed rule will serve this function because it places liability openly on the party who is in the best position to solve the problem.¹⁰⁰ It also provides an effective means by which those injured by criminal products can recover compensation for their injuries. Moreover, if the product continues to be produced, the cost of such recovery will be equitably distributed among those who use the product.¹⁰¹

Another important policy, respect for the law, will also be served by the proposed rule. Criminal products and the advertising that accompanies them, send a distinct message to the public that the law can be disobeyed without consequence. For example, the advertisements for radar detection devices create the impression that speeding is a game; it is not wrong as long as one is not caught.¹⁰² The public may well reason "if the prohibition against speeding were serious, why is it that businesses are permitted to profit from encouraging people, even providing them with the means, to speed?" Moreover, under current law the manufacturers and retailers of radar detection devices do not have to pay for the foreseeable injuries that result from their conduct. The message sent by protecting criminal products is two-fold. First, the law is not to be taken seriously, and second, profit even at the expense of the law is acceptable. The adoption of the proposed rule will cancel that message and send a new one to the boardrooms of American business as well as to the general public, that the law, both letter and spirit, must be respected and profit at the expense of the law will not be tolerated.

VI. Conclusion

If our legal system cannot protect the victims of criminal products, those persons maimed and injured by products whose primary use is to cause just such injuries, who can it protect? No one is immune; any member of the American public may be injured by a criminal product. Should those manufacturers and sellers who bear a direct responsibility for such injury, those who profit from such inju-

100. See W. PROSSER AND P. KEETON, *supra* note 13, § 85, at 610.

101. See also *id.* § 98, at 693.

102. See e.g., Castro, *supra* note 1, (The picture that appears over the article is a photograph, taken from the back seat of a car, that includes the speedometer, a radar detector and a view of the road. The driver is clearly speeding as evidenced by the speedometer and the caption reads: "Topping the limit with impunity on the New Jersey Turnpike, thanks to a handy device.").

ries, go unaccountable? Justice cries out, logic takes flight, and hope is numbed at such a result.